The Legal Intelligencer

Pa. Steps Up NRD Enforcement. Is a Comprehensive NRD Program Coming?

A recent decision from the Pennsylvania Commonwealth Court addressing Pennsylvania's authority and standing to seek NRD may further embolden state officials. The regulated community should be aware of changing NRD landscape in Pennsylvania and work with counsel to manage potential NRD liabilities.

By **Matthew Conley** | July 20, 2022

Matthew Conley of Archer Law. Courtesy photo

For many years, natural resource damages (NRD) enforcement in Pennsylvania has been sporadic and fleeting. Like most states, the commonwealth typically only pursued NRD in response to large releases or as part of a "trustee council" with the federal government or other state trustees. Today, NRD enforcement—and NRD law—in the commonwealth is much different. In recent years, the commonwealth, with the help of contingency-fee counsel, have filed a series of increasingly aggressive and far-reaching lawsuits demanding NRD throughout the state. A recent decision from the Pennsylvania Commonwealth Court addressing Pennsylvania's authority and standing to seek NRD may further embolden state officials. The regulated community should be aware of changing NRD landscape in Pennsylvania and work with counsel to manage potential NRD liabilities.

To appreciate the current state of the commonwealth's NRD enforcement efforts, one must consider how those efforts have evolved over time. The commonwealth's first foray into NRD was a motion to intervene in litigation between the U.S. Environmental Protection Agency and various private entities relating to a Superfund cleanup site in Union Township, Berks County. Filed in 1993, the commonwealth argued, inter alia, that it was the designated "trustee for the commonwealth's natural resources" under the Environmental Rights Amendment (ERA) of Pennsylvania's Constitution, Article I, Section 27, and sought to recover "payment

of its present and future natural resource damage pursuant to" CERCLA Sections 107 and 113. The PADEP noted that "this is the first claim for natural resources damages being brought by the department in its position as trustee of the natural resources of the commonwealth of Pennsylvania."

Subsequent to the Union Township matter, the commonwealth has sought NRD infrequently and, for many years, only in collaboration with other natural resource trustees. For example, in 2004, the commonwealth, along with Delaware, New Jersey and federal trustees, collectively assessed NRD in response to a large release from an oil tanker, M/T Athos I, into the Delaware River. Similarly, in 2005, the commonwealth formed a trustee council with the state of New Jersey and the Delaware River Basin Commission to assess natural resource injuries following a release of 100 million gallons of fly ash into the Delaware River and a nearby tributary in Northampton County. Other NRD assessments performed in the Commonwealth include the Metal Bank Superfund Site in Philadelphia and the Palmerton Zinc Superfund Site in Carbon County.

These were cooperative assessments—without litigation—relying on federal and commonwealth employees to objectively assess natural resource injuries. Where necessary, attorneys from the Pennsylvania Office of the Attorney General would represent the commonwealth in negotiating settlements. In 2006, PADEP proclaimed that it did not have "a formal trustee program" and that, instead, it may seek NRD as "a component [of] civil penalties under the provisions of Pennsylvania's core environmental statutes" depending on "the circumstances of each matter."

However, in recent years, the commonwealth has filed a series of wide-ranging NRD lawsuits that indicate a dramatic shift in the commonwealth's NRD enforcement policies. In each recent lawsuit, the commonwealth has retained outside attorneys to litigate the claims on a contingency-fee basis, who in turn have proffered aggressive arguments regarding the commonwealth's NRD authority and what constitutes a natural resource injury. In 2013, for example, outside counsel representing the commonwealth settled claims, including NRD demands, against Consol Energy for $37 million relating to a dam failure in a state park. Shortly thereafter, in 2014, the commonwealth joined New Jersey, Rhode Island, New Hampshire and other states to assert products liability and other common law claims against the oil industry for MTBE contamination in groundwater. As part of that litigation, which remains ongoing, the commonwealth has demanded "the costs to restore all MTBE contaminated waters [within the commonwealth] to their pre-discharge condition" as well as "damages to compensate the commonwealth for the lost interim value and benefits of their water resources."

More recently, in December 2020, the commonwealth joined Oregon, Ohio, Maryland and other jurisdictions to assert broad NRD claims against Monsanto and related entities. There, the commonwealth is demanding NRD for PCB contamination in various natural resources wherever they exist in the commonwealth, including groundwater, surface water, sediments and biota. The commonwealth does not allege that Monsanto discharged any PCBs in Pennsylvania; rather, the defendants are allegedly subject to commonwealthwide NRD liability for having designed and manufactured a product that was eventually discharged by unidentified third parties. See *Pennsylvania v. Monsanto,* No. 668 MD 2020 (Pa. Cmwlth. Ct.)

The commonwealth, through county and local governments, has also recently asserted NRD claims against the manufacturers and dischargers of PFAS or PFAS-containing products (i.e., aqueous film forming foam (AFFF)). See *Pennsylvania v. 3M Company*, 2:22-cv-01168-RMG (D.S.C.); *Pennsylvania v. 3M Company*, 2:21-cv-02805-RMG (D.S.C.); *Pennsylvania v. 3M Company,* 2:21-cv-01977-RMG (D.S.C.). Again, in each of these matters, the commonwealth has outsourced its prosecutorial authority to prominent plaintiffs' firms pursuant to a contingent-fee arrangement.

These ongoing NRD claims, which are premised largely on common law theories, raise significant questions regarding whether, and in what circumstances, the Commonwealth has authority to recover NRD. For many years, it was commonly understood among environmental practitioners that the commonwealth's authority to seek NRD was set forth in federal or state statutes that specifically authorize NRD recoveries (e.g., CERCLA

or Pennsylvania's Hazardous Site Cleanup Act). The commonwealth had only ever sought NRD pursuant to statutory authority and, in *Commonwealth v. Delta Chemicals*, 721 A.2d 411, 415 (Pa Cmwlth. 1998), the Court recognized that "response costs and natural resource damages … are entirely statutory remedies."

Recently, however, in *Pennsylvania v. Monsanto,* 269 A.3d 623 (Cmwlth Ct. 2021), the court overruled the defendants' preliminary objection arguing that NRD is a remedy only available by statute. Relying in part on the Supreme Court's recent decisions in the *Pennsylvania Environmental Defense Fund v. Commonwealth* litigation, the commonwealth argued that, pursuant to the ERA, it is the trustee of the commonwealth's "public natural resources" and has the authority "to proceed with affirmative litigation, including prosecuting tort claims, to recover damages" for alleged injuries to the trust's corpus (i.e., the "public natural resources").

The Commonwealth Court held Delta Chemicals to be "inapposite" to the issue of "whether the commonwealth or its agencies may seek damages for environmental contaminations" and concluded that it cannot be said "with certainty that Plaintiffs' damage claims are limited to … statutory remedies." Elsewhere, in the context of defendants' challenge to the commonwealth's standing, the court held that the plaintiffs have "trustee standing to the bring instant action pursuant to the ERA."

Further emboldened, the Commonwealth no longer argues that the ERA provides only the standing to assert common law torts (e.g., nuisance, trespass, negligence). Rather, in the PFAS-related litigation, the commonwealth has pled an independent claim for "unlawful violation of the ERA" and demanded "damages sufficient to restore such [natural resources] to their pre-contamination condition." Thus, the commonwealth now maintains that it may assert an affirmative ERA claim against private parties—independent of other torts—wherever it determines there to be "a violation." This theory remains untested in the commonwealth; however, at least one state court has rejected the notion that a government's authority as natural resource trustee creates a new substantive tort. See *State of Vermont v. 3M Company,* No. 547-6-19 (Vt. Sup. Ct., May 28, 2020).

Perhaps more surprising is that the Commonwealth appears to define a "violation" of the ERA to be any detectable contamination within a natural resource. Indeed, in the MTBE litigation, the commonwealth has argued that Act 2 closure at a release site—or compliance with the lowest statewide health standard—does not preclude it from seeking primary restoration or other damages.

Ultimately, the regulated community and environmental practitioners should be aware of the commonwealth's rapidly evolving positions with respect to NRD. Unlike New Jersey, which has a department within NJDEP dedicated to NRD claims, Pennsylvania has not established a formal NRD program within PADEP or DCNR. Whether that will change remains to be seen; however, in the interim, companies should work with experienced NRD practitioners to understand and manage potential liabilities.

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